

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-6218

To be argued by
NEAL M. GOLDMAN

In The

United States Court of Appeals

For The Second Circuit

LYNN ARGO, ARNOLD ARGO, HELEN DENNIS, JAY GROSSMAN, JUDY SWEDE, individually and as Directors of Birchwood Towers Tenants Association, Inc., MAX WULFSON and DORA FRIEDMAN, individually and BIRCHWOOD TOWERS TENANTS ASSOCIATION, INC.,
Plaintiffs-Appellants,

-against-

PATRICIA HARRIS, individually and as Secretary of Housing and Urban Development of the United States; MORRIS SOSNOW, KATE SOSNOW, LEONARD R. SCHWARTZ, JERROLD A. LIEBERMAN, BERNICE LIEBERMAN, and LORRAINE S. SANFORD, doing business as Birchwood Towers #1 Associates and doing business as Birchwood Towers #2 Associates; THE CONCILIATION AND APPEALS BOARD,

Defendants-Appellees,

(Continued on Reverse)

BRIEF OF DEFENDANTS-APPELLEES MORRIS SOSNOW, KATE SOSNOW, LEONARD R. SCHWARTZ, JERROLD A. LIEBERMAN, BERNICE LIEBERMAN, and LORRAINE S. SANFORD, doing business as Birchwood Towers #1 Associates and doing business as Birchwood Towers #2 Associates (Landlord-Appellees)

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-and-

THE HOUSING AND DEVELOPMENT
ADMINISTRATION OF THE CITY OF NEW YORK,

Defendant-Cross Appellant.

*On Appeal of a Preliminary Injunction, pursuant to 28 U.S.C.
Section 1292 (a) (1), from the United States District Court for
the Eastern District of New York.*

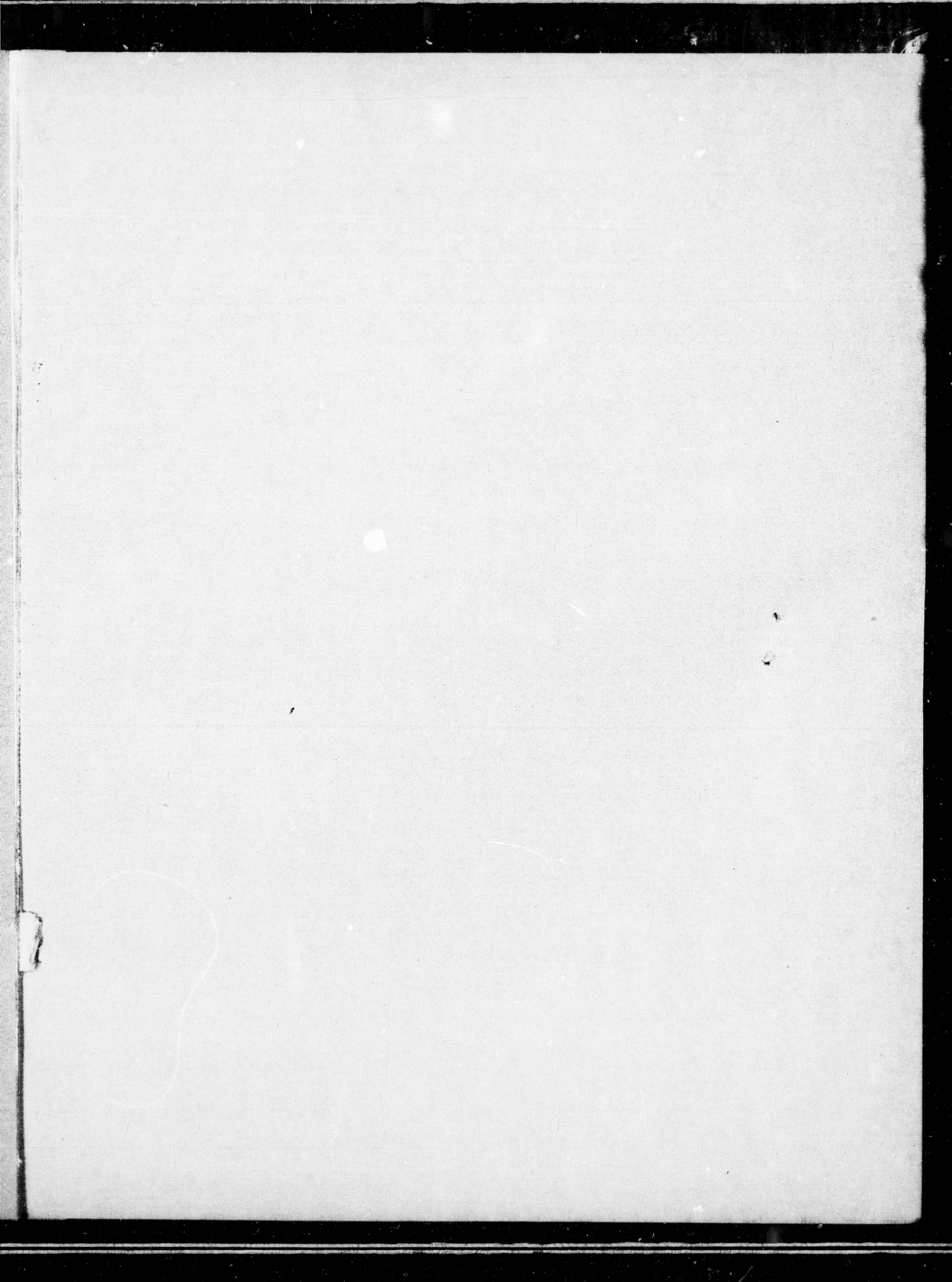


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COUNTERSTATEMENT OF
ISSUES PRESENTED
FOR REVIEW

1. Are the requirements of due process satisfied so that an administrative decision of the Department of Housing and Urban Development ("HUD") preempting a privately owned apartment project, the mortgage on which HUD insures, from local rent control, is valid, where that administrative decision was made after the District Court, upon suit of the tenants of the project and their tenants' association, directed that HUD reconsider the landlord's application for preemption after the tenants had been given an opportunity to see and comment on the application and the tenants had, in fact, done so?

2. Is the District Court's Order directing payment of disputed rentals to the landlord retroactive to November 12, 1976 proper where the tenants and landlord entered into a stipulation on that date providing for payment of disputed rentals into escrow on condition that the escrowed funds would be paid to the prevailing party?

COUNTERSTATEMENT OF THE CASE

This is an appeal by plaintiffs, LYNN ARGO, ARNOLD ARGO, HELEN DENNIS, JAY GROSSMAN, JUDY SWEDE indiv-

idually, and as Directors of BIRCHWOOD TOWERS TENANTS ASSOCIATION, INC., MAX WULFSON and DORA FRIEDMAN, individually, and as BIRCHWOOD TOWERS TENANTS ASSOCIATION, INC. ("Tenants") from an order of preliminary injunction entered on November 29, 1977 by the United States District Court for the Eastern District of New York (125a)* which decreed, inter alia, that defendants MORRIS SOSNOW, KATE SOSNOW, LEONARD F. SCHWARTZ, JERROLD A. LIEBERMAN, BERNICE LIEBERMAN and LORRAINE S. SANFORD doing business as BIRCHWOOD TOWERS #1 ASSOCIATES and doing business as BIRCHWOOD TOWERS #2 ASSOCIATES ("Landlord") had demonstrated irreparable injury and substantial probability of success on the merits that a HUD regulation permitting HUD to preempt local regulation of rents charged by landlords whose buildings were subject to mortgages insured by HUD, 24 CFR §403.1 et seq ("the Regulation"), is a valid exercise of Congressionally delegated powers, that the application of the Regulation directly conflicts with state and local laws governing rent control in New York City such that, pursuant to the Supremacy Clause (Article VI, Clause 2 of the Constitution of the United States), the latter must yield and that HUD's determination that preemption was proper, after the Tenants had been afforded the opportunity to participate in the decision making process, and had done so, would validly remove BIRCHWOOD TOWERS from local rent control and entitle the Landlord to collect preemption rents approved by HUD retroactive to November 12, 1976.

*References to pages followed by the letter "a" are to pages of the Appendix.

The Tenants commenced this action in October, 1976 seeking to enjoin the Landlord from collecting rents approved by HUD after HUD had, by administrative determination dated September 1, 1976, preempted local control of BIRCHWOOD TOWERS. The Landlord counterclaimed for injunctive and declaratory relief as to the validity of the preemption. Thereafter both the Tenants and the Landlord moved for preliminary injunctions. While these motions were pending, the Tenants voluntarily entered into an escrow arrangement with the Landlord (62a-65a) whereby the Tenants agreed to pay the HUD approved preemption rents to their attorneys with the escrow fund to be awarded to the prevailing party. On January 13, 1977 the District Court, Honorable Thomas C. Platt, held, 425 F.Supp 151 (E.D.N.Y. 1977) that the Regulation was "consistent with statutory authority and was a necessary and reasonable means of carrying out that authority" (71a), that it was validly invoked (72a) and that if HUD validly preempts local rent control the Landlord may collect the HUD rents in accordance with lease provisions permitting immediate collection (73a). Judge Platt held further that HUD should give the Tenants an opportunity to inspect the Landlord's application for preemption and to submit written comments and should render a written decision "outlining why preemption is necessary or unnecessary." (82a) The District Court also certified the Tenants as representatives of the class of all tenants in

BIRCHWOOD TOWERS (84a).

It is important to note that the Tenants do not appeal from any of these determinations, nor do they dispute the facts found by the District Court (66a-70a).

Finally, Judge Platt ordered that the escrow arrangement agreed to by the parties be continued and that the escrow fund be disposed of in accordance with HUD's decision on preemption (82a).

On March 4, 1977, the District Court ordered that the Landlord's application be made available at BIRCHWOOD TOWERS for inspection by the Tenants and that the Tenants' objections be filed with HUD by April 4, 1977 (3a, #32; Order dated 3-4-77). Thereafter, the Tenants submitted extensive written comments on the Landlord's preemption application (120a; 3a, #39; Letter of Marc Kahn dated May 23, 1977). On October 11, 1977, HUD filed its Administrative Determination in which it considered in detail the Tenants' objections to preemption, properly rejected them and reaffirmed its prior decision to preempt. (120a-124a). Thereafter the District Court entered the Order from which this appeal is taken.

ARGUMENT

POINT I

THE SECOND HUD ADMINISTRATIVE
ORDER WAS PROPERLY MADE

The Tenants contend that the District Court erred

by approving HUD's determination of October 11, 1977 and by directing the Tenants to pay HUD jeopardy rents retroactive to November 12, 1976.

Initially they argue that since the first preemption order had been stricken for want of due process, the Court cannot award rents retroactively under an invalid administrative decision. This argument completely misperceives the character of the District Court's order. It does not require action pursuant to the September 1, 1976 preemption order (14a-16a). Rather, the preliminary injunction requires payment of HUD jeopardy rents pursuant to the October 11, 1977 preemption determination (120a-124a), which was made only after the Tenants had been afforded the due process required by Judge Platt's Decision and Order of January 13, 1977, 425 F.Supp. 151 (E.D.N.Y. 1977) (82a), and was in accordance with the Tenants' own agreement, embodied in their Stipulation (64a), to pay such HUD rents.

Significantly, the Tenants are not objecting to the procedures themselves, nor do they complain of the obligation to pay HUD rents on and after October 11, 1977. Their claim is limited to the rents they voluntarily paid into escrow

between November 12, 1976 and October 11, 1977.

As if they recognize that their initial argument is without force, the Tenants go on to contend (Appellants Brief at 12) that the District Court:

"erred by failing to void the first preemption order and by directing instead, without explanation, that the monies collected under an invalid order be delivered to the owners if HUD later decided, after notice and hearing, that preemption was necessary."

The Tenants are wrong on all counts. The rents were not "collected under an invalid order" but were escrowed under the voluntary stipulation for the Tenants. (62a).

Moreover, the cases cited by the Tenants are inapposite. They merely stand for the proposition that there shall be no taking without due process of law, a proposition the District Court reaffirmed by its decision (73a-82a).

In Stanley v. Illinois, 405 U.S. 645 (1972) (Appellant's Brief at 13), the unwed plaintiff father's illegitimate children were declared wards of the state upon their mother's death, pursuant to the presumption that an unwed father is an unfit parent, without any inquiry into the fitness of their unwed father. The Supreme Court held that as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him. 405 U.S., supra at 649.

That the Supreme Court noted that a wrong may not be done even if it can be undone, Id. at 649, is of no relevance to the instant case, despite the Tenants' arguments to the contrary (Appellants' Brief at 13). In Stanley, the Court said that the plaintiff could not be made to suffer from the deprivation of his children before a hearing. It did not say that such a result could not follow after a hearing. Indeed, the Court remanded the case for further proceedings. 405 U.S. at 659.

In the case at bar, no wrong has been done which requires undoing. The Tenants suffered no deprivation before they were afforded due process. They agreed to pay certain rental increases into escrow pending a final determination of the action. The Landlord is seeking these increases now, only after the Tenants have had the due process they sought. Furthermore, the initial HUD determination did not affect the Tenants' rights in the subsequent determination. The Tenants came to the second HUD proceeding with no burdens to overcome and with no prejudice against their rights to a full and fair hearing.

Fuentes v. Shevin, 407 U.S. 67 (1972) (Appellants' Brief at 10) does not advance Tenants' argument. Here too the Court held only that the "taking" could not occur prior to a hearing, 407 U.S. at 95. Again, the Court did not say that a seizure could not result after a hearing. Indeed it spec-

ificantly said otherwise, Id. , and remanded for further proceedings. 407 U.S.at 97.

The District Court did not decree that the Tenants should have due process in order that a wrong might be undone. Rather, it held that the Tenants should have due process in order to determine if rental increases were properly required. In effect, if not in words, it remanded for further proceedings. Once those proceedings were had, the District Court did not validate the earlier determination. Instead, it issued a preliminary injunction based on the subsequent HUD determination and the Tenants' voluntary agreement. There simply is no taking without due process of law involved in this case.

Although the Tenants claim that an otherwise valid order cannot be applied retroactively, they cite no law to support this proposition (Appellants' Brief at 13, 14), Their argument that retroactive application is particularly offensive in a preemption case where HUD made its initial determination on the Landlord's ex parte application (Id. at 14) is irrelevant since the determination which has been given retroactive application was made only after all parties were given full due process of law and misleading in its failure to account for the Tenants' agreement to pay the escrow monies to the prevailing party.

None of the cases cited by the Tenants even deal

with their claim that an administrative agency cannot take an action after due process, which action had been previously struck down for want of due process. Nothing said by this Court in Burr v. New Rochelle Municipal Housing Authority, 479 F.2d 1165 (2d Cir. 1970), or Caramico v. Secretary of Dept. of Housing and Urban Development, 509 F.2d 694 (2d Cir. 1974), precludes reappraisal of an administrative action after due process. Indeed at least one Court has given de facto approval to subsequent due process reconsideration of administrative action. In Geneva Towers Tenants Org. v. Federated Mortgage Inv., 504 F.2d 483 (9th Cir. 1974), one of the landlords involved, the Kate Maremount Foundation, asked that its application for a rent increase be reprocessed pending appeal of the District Court's decision that the Tenants were entitled to due process before an increase could be approved and effected. On reconsideration after due process, HUD reaffirmed the original increase and granted an additional increase. The Court, while dismissing the landlord's appeal, did not reverse the HUD reaffirmation. 504 F.2d, supra, at 485-86, n.1. The District Court here relied on that decision, Keller v. Kate Maremount Foundation, 365 F.Supp. 798 (N.D. Cal. 1972) in prescribing the remedy afforded herein (82a).

As a general proposition, retroactive application of civil laws are not prohibited by the Constitution. Fisch v. General Motors Corporation, 169 F.2d 266, 271-2 (6th Cir. 1948),

A fortiori, there is no defect in the retroactive application of an administrative order.

In Sobel Corrugated & Wooden Box Co. v. Fleming, 165 F.2d 568 (6th Cir. 1948), pursuant to Maximum Price Regulations effective July 30, 1942, the plaintiff was required to file a pricing formula based on its costs during the month of October, 1941 and to preserve its records for that period. In February, 1945, the Price Administrator charged that Sobel had failed to preserve the required records or to file its pricing formula. Sobel responded that most of its records had been destroyed by fire in September, 1941, that it had shown any preserved records to the OPA and admitted that it had not filed a pricing formula in 1942 or 1943 but had filed on March 3, 1945. That formula filed by Sobel was rejected by the OPA. 165 F.2d, supra, at 569. In April, 1945, the OPA established a pricing formula for Sobel. In September, 1945, it amended the Order to make it applicable before, as well as after April, 1945, the original date of its issuance. Id. at 570.

Sobel argued that the Order was retroactive and therefore invalid. The Court decided however that "a retroactive law or regulation in the situation here involved is not in itself bad, if reasonable." Id. The Court held that the retroactive order was not unreasonable in view of the difficulty the OPA had in acquiring from Sobel the data it needed to determine the

the validity of Sobel's prices.

Similarly, in the instant case, even apart from the Tenants' agreement to pay the rents to the Landlord from November 13, 1976, retroactive application of the HUD determination is not unreasonable.

The principal rationale against retroactivity is the element of surprise:

" . . . A person who has changed his position, omitted to change it, or made commitments in reliance upon the law in force at the time is suddenly confronted with a change in the law applicable to his prior conduct, resulting in a liability or loss of investment which he has no opportunity to anticipate and avoid. On the other hand, in the cases holding the retroactive application of a statute consistent with due process of law, the element of surprise is lacking. There has been no change of position, omission to change or commitment in reliance upon the law in force at the time." Neild v. District of Columbia, 110 F.2d 246, 255 n.42 (D.C. Cir. 1940).

In the instant case, the second HUD preemption determination has been given retroactive application only to November 12, 1976, the date the Tenants consented to payment of HUD rentals into escrow. (64a-65a). Indeed, since on or before October 19, 1976 when the Tenants commenced this action, the Tenants have known that increased rentals were likely. Since November 12, 1976, they have been paying such increased rentals voluntarily. It cannot now be contended that there has

been "a change of position, omission to change or commitment in reliance upon the law in force at the time." Neild v. District of Columbia, supra, 110 F.2d at 255 n.42. At least from the time the HUD determination retroactively applies, the Tenants have stayed at Birchwood knowing that rental increases were likely and in spite of the fact that the Order appealed from gave them the opportunity to leave without penalty within ninety days of service of the Order (127a, 65a).

Furthermore, although it was not necessarily the fault of the Tenants, it took more than one year from the original HUD preemption order and ten months from the time Judge Platt held that the Tenants were entitled to due process for HUD to announce its second determination. The Landlord's need for the rental increases was greater than ever by the time the second determination had been made. In view of the fact that Landlord did not cause and has been seriously prejudiced by the delay and that the Tenants have not relied on the lower rentals, retroactive application of the HUD preemption determination is not unreasonable.

Significantly, the Tenants do not even address themselves to the cases on which the District Court relied in fashioning the relief which clearly presaged the preliminary injunction attacked herein.

In Ponce v. Housing Authority of the County of Tulare, 389 F.Supp. 635 (E.D. Cal. 1975) the Court held that

tenants in low rent farm labor housing projects were entitled to notice and a hearing before their rents were increased. 389 F.Supp., supra, at 648-9.

The Court considered the question of whether the amounts of increased rental collected to the date of its decision should be refunded and held that:

Such an immediate refund of excess rental collected since April 1, 1973 would entail a substantial amount of money and may have a significant effect on the housing projects. Neither the [landlords] nor the tenants here should suffer because of the federal defendants' failure to afford them a due process hearing. Therefore, the order must be carefully drawn so as to preserve the tenants' due process rights while protecting their interests in a financially secure housing project. Id. at 656 (emphasis added).

Thus, the Court ordered the Landlord Housing Authority to set up an escrow account and deposit therein an amount equal to the rental increases collected since the increases had been originally ordered. Id. at 656. The Tenants were ordered to continue to pay present rentals, with increases going into the escrow account. Id. If, after a hearing was held, the application for rent increases was approved, the money in the escrow account would be returned to the Housing Authority, including such monies which had been collected prior to the hearing. Id. at 657.

Similarly, in Keller v. Kate Maremount Foundation, supra, aff'd 504 F.2d 483 (9th Cir. 1974) the Court held that tenants were entitled to notice and an opportunity to comment and object before rental increases were approved. 365 F.Supp. at 804.

There, too, the tenants had been paying increased rents without having been afforded due process. The court ordered the tenants to continue to pay such rents to the landlord. If the FHA re-approved the rent increases, the landlord would keep all monies paid since the increases had initially been approved. Id. As noted supra, p.9 , the rent increase was re-approved pending appeal and the Court of Appeals did not disturb the award.

The Tenants cite no cases which question or attack the validity of the remedy in either Keller, Ponce or the case at bar. Their authority is limited to the proposition that HUD could not preempt local rent controls and effect rent increases without providing due process to the tenants, an issue long since conceded. In view of the fact that the preemption determination in issue is the determination which followed notice to the tenants and an opportunity to object and comment, by the Tenants' own argument, the HUD determination and the District Court's order was proper.

POINT II

NOTWITHSTANDING THE STIPULATION
OF NOVEMBER 12, 1976, THERE WAS
REAL DANGER OF IRREPARABLE
INJURY TO BIRCHWOOD WHICH WAR-
RANTED THE PRELIMINARY INJUNCTION

Just as it did in Jacobson & Co., Inc. v. Armstrong Cork Co. 548 F.2d 438 (2d Cir. 1977) (Appellants' Brief, p. 15), this Court should review the affidavits and other evidence tendered below and should conclude that the District Court in exercising its discretion to issue the preliminary injunction was justified. 548 F.2d supra at 443 n.5. The evidence below graphically indicates that the Landlord has been and still is on the verge of defaulting on its mortgages.

"Foreclosure clearly represents irreparable injury for which there is no adequate remedy at law." Kent Farm Co. v. Hills 417 F. Supp. 297, 302 (D.D.C. 1976). Moreover, in this specific case foreclosure will adversely affect the national housing program of which the Landlord is a part and will cause irreparable injury to the public interest. See City of Boston v. Hills, 420 F. Supp. 1291, 1299-1300 (D. Mass 1976).

The November 12, 1976 Order, consented to by both the Landlord and the Tenants, which directed the Tenants to pay HUD jeopardy rents into an escrow administered by the Tenants' counsel, did not in any way avert this danger of irreparable harm and did not preclude the preliminary injunction granted by the District Court below.

That Order merely relieved the Landlord from the insecurity of having not to find defaulting tenants and collect past due increases from them in the event it ultimately prevailed in the case at bar. However, the Order did not and does not permit the Landlord to use the rental increases which it so desperately requires.

The one case relied on by the Tenants, Chris Craft Industries, Inc. v. Bangor Punta Corp., 426 F.2d 569, 573 (2d Cir. 1970) (Appellants Brief, at 15) involved a totally different factual situation and does not govern the case at bar. In Chris-Craft, the plaintiff sued to determine whether the defendant had acquired shares of Piper Aircraft in violation of S.E.C. Rules and had sought a preliminary injunction to restrain a merger between defendant and Piper pending a final decision on the merits.

Counsel for defendant orally stipulated at argument that no merger between Bangor Punta and Piper would be effected before the end of the litigation. 426 F.2d, supra at 573. Accordingly, the preliminary injunction was denied. Id.

In Chris-Craft the stipulation gave the moving party exactly the relief it sought by its request for preliminary injunction. In the case at bar the Landlord sought a preliminary injunction restraining interference with the collection of HUD approved rents. Self-evidently, the escrow arrangement did not give the Landlord that which it sought on its motion for preliminary injunction and did not render that motion either moot or unnecessary. Unlike Chris-Craft the parties

did not stipulate "that the action which irreparably threatened the [landlord] would not take place during the litigation" [Appellants' Brief p. 15]. The Landlord has faced and still faces the immediate threat of default and foreclosure throughout these proceedings. Thus at the time the District Court entered its Order of Preliminary Injunction it quite properly found that the Landlord had demonstrated irreparable injury (126a) notwithstanding the escrow arrangement.

Additionally, the Court should consider that the escrow arrangement permitted individual tenants to vacate their apartments if the Landlord prevailed (65a, ¶4[b]). That aspect of the agreement was also effectuated by the Order on appeal (127a, ¶2). A vacature of the preliminary injunction would leave the Landlord in the anomalous position of having been compelled to permit Tenants to vacate without permitting the Landlord to collect any of the rents to which it has a clear right. Such an inequitable result should not be countenanced.

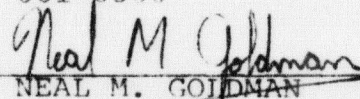
CONCLUSION

For the reasons stated above, the Order of the District Court should be affirmed in all respects.

Respectfully submitted,

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BY


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A 202 Affidavit of Personal Service of Papers
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SECOND CIRCUIT

LUTZ APPELLATE PRINTERS, INC.

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GOSSMAN, JUDY SWEDE, ind. and as directed, etc.,

Plaintiffs-Appellants,

- against -

PATRICIA HARRIS individually and as Sec. of Housing & Urban
Development of U.S.A. Morris Sosnow, etc.,

Defendants-Appellees

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, JAMES A. STEELE *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
112 West 136th Street, New York, New York
That on the 27th day of Feb. 19 78 *at see attached*

deponent served the annexed

upon

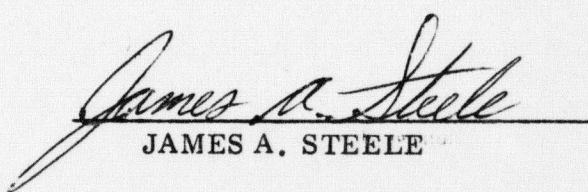
Brief

see attached

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 27th
day of February, 19 78


ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979


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